

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

=====

File:

Date:

JUL - 1 1996

In re:

IN EXCLUSION PROCEEDINGS

INDEX

APPEAL

ON BEHALF OF APPLICANT: Jean Koh Peters, Esquire
Charlotte Burrows
P.O. Box 9688
Brewery Street Station
New Haven, Connecticut 06536

ON BEHALF OF SERVICE: Stewart Deutsch
Appellate Counsel

ORAL ARGUMENT: April 3, 1996

EXCLUDABLE: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C.
§ 1182(a)(6)(C)(i)] - Fraud or willful
misrepresentation of material fact

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C.
§ 1182(a)(7)(A)(i)(I)] - No valid immigrant visa

Sec. 212(a)(7)(B)(i)(I), I&N Act [8 U.S.C.
§ 1182(a)(7)(B)(i)(I)] - Nonimmigrant without
valid passport

Sec. 212(a)(7)(B)(i)(II), I&N Act [8 U.S.C.
§ 1182(a)(7)(B)(i)(II)] - No valid nonimmigrant
visa or border crossing card

APPLICATION: Asylum; withholding of deportation

In an oral decision dated March 22, 1994, the Immigration Judge found the applicant excludable on the second charge of excludability, 1/ denied his applications for asylum and withholding of deportation under sections 208(a) and 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h)(1), and ordered him excluded and deported from the United States.

1/ The Immigration Judge noted that the Service dropped the third and fourth charges of excludability and determined that the applicant was not excludable under section 212(a)(6)(C)(i) of the Act. See I.J. at 2, 4. The evidence of record supports the Immigration Judge's conclusion, and accordingly we will not disturb that determination here. Cf. Matter of Pula, 19 I&N Dec. 467 (BIA 1987).

The applicant has timely appealed from that decision. In his Notice of Appeal (Form EOIR-26) and his appellate brief, the applicant identifies numerous points of error. At oral argument, the applicant, through his representative, essentially limited his points on appeal to his status as an Albanian Muslim and the disproportionate harm he would experience if returned to the former Republic of Yugoslavia for having evaded conscription. The applicant claims that his status as an Albanian Muslim from Montenegro, in and of itself, qualifies him as a refugee for purposes of asylum and that any probable, disproportionate, and prospective punishment for having evaded the draft establishes that his fear of future persecution is well-founded.

The Immigration and Naturalization Service opposes the applicant's position. It contends that the applicant failed to show any fear of future persecution is objectively reasonable. It underscored that the applicant had served in the Yugoslavian Army previously, failed to show that he would be required to serve again, and did not establish that he could not receive an exemption from any prospective service. In addition, the Service argues that country conditions have changed in the former Yugoslavia to such an extent that the applicant's fear of future persecution is no longer objectively reasonable. See Reply Brief of the Immigration and Naturalization Service.

On appeal, both parties submitted additional documentary evidence and moved that this Board consider them on appeal. At oral argument, both parties claimed that the case could be decided solely on the record before the Immigration Judge. In this case, we agree with their assessment, deny each party's motion, and base our decision on the record as it existed before the Immigration Judge. See Matter of Fedorenko, 19 I&N Dec. 57, 74 (BIA 1984); see also Matter of Chang, 20 I&N Dec. 38, 40 n.1 (BIA 1989); Matter of Soriano, 19 I&N Dec. 764, 766 (BIA 1988). The appeal will be sustained.

I. BACKGROUND

The applicant, a native and citizen of the former Republic of Yugoslavia, sought entry into the United States at New York, New York, on May 13, 1992. On presenting himself for inspection, he indicated that he intended to seek asylum. The Service paroled the applicant into the United States and then on May 20, 1992, filed a Notice to Applicant for Admission Deferred with the Immigration Court. See Exh. 1.

The applicant filed an application for asylum with the Immigration Court, which also deemed it an application for withholding of deportation. Accord, 8 C.F.R. §§ 208.3(b), 236.3. At exclusion proceedings held on March 22, 1994, the applicant

testified in support of his applications for relief. He explained that he is an Albanian Muslim from Plav, Montenegro, that he resided there throughout his youth, and received much of his education in Plav (Tr. at 20). See also Exh. 3, Aff., at 2. The applicant stated that he completed his secondary schooling in Belgrade in 1989, performed his one year mandatory military service, and then pursued advanced studies in Sarajevo in 1990 (Tr. at 25-26, 29, 34). See also Exh. 3, Aff., at 3.

The applicant explained that during a spring recess in 1992, he returned home to Plav to visit his then-ill mother. He testified that while home, military and civilian police officers attempted to conscript him (Tr. at 36-37). According to the applicant, he was at his uncle's home at the time of his imminent recruitment, realized the high probability of further service, and therefore procured a "visa" for the United States (Tr. at 40-42). To reach the United States, the applicant traveled through Croatia and Slovenia, resided with a friend in Germany for one month, continued in transit through Denmark, and subsequently arrived in New York, according to his testimony (Tr. at 44-46). See also Exh. 6, Form I-589, No. 28.

The applicant testified that to return to Plav would inevitably lead to conscription and his being forced to commit acts which the international community condemns (Tr. at 52). He underscored that other Albanian Muslims had been forced to commit war crimes or faced reprisals themselves. To potentially expose himself to this kind of situation in and of itself is a basis for a well-founded fear of future persecution, according to the applicant. Furthermore, he contended that even if he was not required to participate in war crimes, he would invariably face persecution on account of his religion and nationality. He highlighted how many Albanian Muslims have suffered at the hands of Serbians and referenced the treatment of Bosnian Muslims and Kosovars to support this point.

II. DISCUSSION

We have reviewed the record of proceeding, the Immigration Judge's decision, and the applicant's contentions on appeal. For purposes of this decision, we will assume the facts to which the applicant testified and averred and reconcile inconsistencies of record, if any, in his favor. In addition, we take administrative notice of the State Department 1995 Country Report for Serbia/Montenegro. Both parties acknowledged this report at oral argument, and both recognized our ability to do so. See Matter of H-M-, 20 I&N Dec. 683, 689-90 (BIA 1993); Matter of R-R-, 20 I&N Dec. 547, 551 n.2 (BIA 1992).

Based on this review, we find that the applicant has established a well-founded fear of future persecution. Though the record as it stood before the Immigration Judge shows that the applicant might have been forced to commit acts condemned by the international community had his conscription been successful, we ground our decision solely on the probable, disproportionate, and prospective harm the applicant might face for having evaded conscription. We note that country conditions have not altered to such an extent to overcome a finding of future persecution. Finally, because of these findings, we need not, and therefore do not, address the applicant's status as an Albanian Muslim in and of itself.

A. Statutory Eligibility

"Persecution" means "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." See, e.g., Osorio v. INS, 18 F.3d 1017, 1031 (2d Cir. 1994); Guevara Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987); Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985). Regardless of the particular claim, an applicant bears the burden in showing that the persecution claimed is on account of one of the bases enumerated in the Act. See INS v. Stevic, 467 U.S. 407, 425 (1984); Matter of Mogharrabi, 19 I&N Dec. 439, 440-41 (BIA 1987); 8 C.F.R. §§ 208.13(a), 236.3.

Here, applicant has essentially admitted that he suffered no past persecution, but insists that his fear of future persecution is well-founded. See section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. §§ 208.13, 208.16; see also INS v. Elias-Zacarias, 502 U.S. 314 (1992); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). In general, draft evasion does not give rise to a well-founded fear of future persecution. Repeatedly this Board has recognized that a sovereign retains the right to preserve its borders and to protect itself. See Matter of A-G-, 19 I&N Dec. 502, 506 (BIA 1987) (articulating principle and referencing multiple decisions to support point), aff'd sub nom. M.A. v INS, 899 F.2d 304 (4th Cir 1990). Conscription furthers that end. However, when conscription places an individual in a position where either he might be forced to commit acts which the international community condemns or the evasion of which can lead to severe, disproportionate punishment distinct from other evaders, then we have deemed cognizable certain claims to establish a well-founded fear of future persecution. See Matter of A-G-, supra, at 506; see also Utkor v. McElroy, No. 95-CIV 5127(SS), 1996 WL 175094, at *3 (S.D.N.Y. Apr. 15, 1996).

These exceptions are the bases on which the applicant has grounded his request for asylum. We consider the first exception moot for purposes of this appeal insofar as the applicant at oral argument, through his representative, admitted that on-going changes throughout the former Yugoslavia would no longer place the applicant in a position where he might be forced to commit acts the international community condemns. The second exception, however, remains relevant to these proceedings, and for purposes of this decision is determinative to grant the applicant relief.

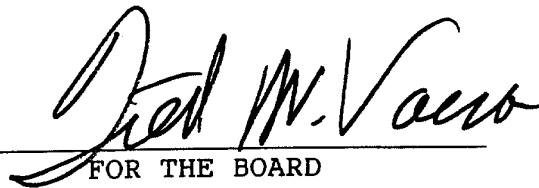
At oral argument, the applicant indicated that to return to the former Yugoslavia would expose him to severe, disproportionate punishment on account of his Albania Muslim nationality and religion because he evaded the draft. The record as it stood before the Immigration Judge is replete with information to show that Albanian Muslims are seriously harassed and discriminated against, if not outright persecuted, by Serbians. See generally Tr. at 30 (testifying that Albanians "given most difficult tasks" in military and that Albanian soldier "killed by a [Serbian] guard"); Exh. 7, Country Report, at 4-5 (recognizing severe penalties for draft evaders); Exh. 8, Tabs A-LL (underscoring abuse of Albanian Muslims throughout former Yugoslavia). No evidence before this Board shows that Yugoslavian authorities distinguish among Albania Muslims within or without certain regions of the former Yugoslavia for conscription purposes, nor does anything give us pause to think otherwise. At oral argument, the Service acknowledged the precarious changes in Yugoslavia, and both parties attested to the volatility within and without that area. Accordingly, we find the applicant statutorily eligible for relief.

B. Discretion

We have determined that the applicant is statutorily eligible for asylum because he has a well-founded fear of persecution on account of the probable, disproportionate, and prospective harm he might suffer as an Albanian Muslim for having evaded the draft. We underscore that a grant of asylum is discretionary, but remain mindful that the danger of persecution outweighs all but the most egregious adverse factors. Accord. Matter of Pula, supra, at 474. We have reviewed the record in its entirety and are satisfied that discretion should be exercised favorably in this particular case. Accordingly, we exercise discretion in his favor, sustain his appeal, need not address his application for withholding of deportation, and enter the following orders:

ORDER: The appeal is sustained.

FURTHER ORDER: The applicant is granted asylum pursuant to section 208 of the Act.


FOR THE BOARD